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United States Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Comments to Notice of Proposed Rulemaking (69 Fed. Reg. 61184); The Effect of Treating Audioconference Services as Pay-Per-Call Services

To the Commission:

This firm represents Blue Audio Inc. ("Blue Audio"), on behalf of whom we respond to the request of the Federal Communications Commission (the "Commission") for comments as set forth in the Notice of Proposed Rulemaking published at 69 Fed. Reg. 61184 (the "NPRM").

Blue Audio is in the business of providing audioconference entertainment services ("Audioconference") to consumers. Audioconference is a service whereby consumers place a call to a domestic United States telephone number and, through a conference bridge provided by Blue Audio, are connected with other United States callers for the purpose of social interaction. Blue Audio does not charge landline consumers for its services. Rather, the only fee a consumer incurs (if any) is a regular long distance transport fee the consumer's local or long distance carrier may charge.

47 U.S.C. § 228 ("Section 228") regulates telecommunication carriers' offering of pay-per-call services. Unlike Blue Audio's services, pay-per-call service providers charge consumers a per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call. Consequently, the Commission imposes broad regulations on pay-per-call providers in an effort to protect consumers against unauthorized or unwitting premium charges.

The NPRM sets forth proposed regulations (the "Proposed Rules") which would regulate Audioconference services in the same manner as pay-per-call services. Blue Audio submits that the Commission should not enact the Proposed Rules for four reasons. First, the Commission is not authorized to implement the Proposed Rules. The Proposed Rules would change the definition of "pay-per-call" inconsistent with Section 228 without congressional authority and contrary to congressional intent. Second, the Proposed Rules violate the First Amendment to the United States Constitution by imposing an unnecessary burden on individuals who engage

in conversation and expression. Third, the Proposed Rules would force Blue Audio and similarly situated small businesses out of the market. Blue Audio could not comply with the Proposed Rules without implementing a cost prohibitive billing mechanism. Fourth, consumers would lose the inexpensive and safe form of entertainment altogether. Most Audioconference providers would leave the market. The few Audioconference providers that might be able to afford the billing mechanism proposed, in order to simply recoup costs, would have to charge consumers a fee literally a hundred times or greater than the fee consumers now pay to access Blue Audio services. Audioconference services as consumers know them today would be forever lost.

Based on the foregoing considerations which are further discussed below, Blue Audio submits that the Commission should not implement to the Proposed Rules, or alternatively, the Commission should limit the scope of the Proposed rules such that Blue Audio would be exempt from the regulations.

I. BACKGROUND

A. BLUE AUDIO SERVICES

Blue Audio provides services that allow consumers to dial local or long distance telephone numbers, connect with other consumers (via a multiple voice bridging service), and engage in conversation. Blue Audio does not charge landline consumers for the services. Rather, consumers are only billed their regularly charged, tariffed rates, which consumers pay to their designated interexchange carriers. Blue Audio offers Audioconference services via local telephone numbers. Consequently, consumers located in the areas where Blue Audio offers its service through a local area code do not pay any fee for making the call and accessing the service. Alternatively, consumers out of the area can dial numbers to Blue Audio's services in non-local area codes, in which case those consumers pay their standard long distance rates. In an instance where the consumer has subscribed to a long distance plan that provides, for example, unlimited nationwide calling, the consumer can use Blue Audio's services without paying any fees whatsoever (except those associated with the subscriber's long distance plan).

Each local exchange carrier (referred to herein as a "Terminating Carrier") receives fees from other carriers (referred to herein as "Originating Carriers") for terminating calls the Originating Carriers send to the Terminating Carrier's network. Terminating Carriers generate more revenue from Originating Carriers for each additional minute of traffic terminated. Blue Audio receives millions of minutes in traffic per day. Consequently, Terminating Carriers receive substantial revenue for calls terminating to Blue Audio numbers.

Blue Audio derives its revenue solely through contracts with Terminating Carriers. The Terminating Carrier agrees to pay Blue Audio a small portion of the revenue it receives

from Originating Carriers for calls to Blue Audio's lines. As a result of this contractual structure, consumers benefit because they only pay normal rates for local or long distance services when they access the service provided by Blue Audio. The consumer pays the same to access Blue Audio's services as the consumer would pay to place a call to the consumer's friends or family located in the applicable area code.

B. PAY-PER-CALL SERVICES — LEGISLATIVE BACKGROUND

The Telephone Disclosure and Dispute Resolution Act of 1992 (TDDRA), which added Section 228 to the Communications Act of 1934, sets forth the definition of pay-per-call services. Section 228 defines pay-per-call service as any service providing (1) audio information/entertainment; (2) for which "the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call"; and (3) which is accessed through a 900 number or other number designated by the Commission. 47 U.S.C. § 228.

Section 228, and the regulations promulgated pursuant thereto, govern pay-per-call services concerning billing, disconnection, and blocking. Section 228 requires common carriers who provide local exchange service to provide consumers the option of blocking access to prefixes or area codes used by pay-per-call services. See 47 U.S.C. 228 (c)(5); See *also* 47 CFR 64.1508. The statute further requires that pay-per-call charges be separately stated on telephone bills, and requires certain disclosures to consumers about the nature of pay-per-call services and charges. See 47 CFR 64.1502, 1504, and 1509. Finally, Section 228 prohibits a common carrier from disconnecting any subscriber's telephone services due to nonpayment of charges relating to pay-per-call services. 47 U.S.C. § 228 (c)(4).

C. THE PROPOSED RULES

The Proposed Rules require Audioconference providers to offer their services by (i) 900 numbers¹, (ii) pursuant to presubscription agreements, or (iii) requiring direct payment (such as credit card or check-by-phone). See 69 Fed. Reg. 61187. This requirement is identical to the requirement imposed on certain pay-per-call services under TDDRA and its regulations. 47 U.S.C. § 228 (c)(7)(C)(i) and (c)(9). The NPRM seeks comment about the treatment of revenue sharing arrangements between audiotext service providers and common carriers. See 69 Fed. Reg. 61188. Finally, the NPRM seeks comment on broader policy factors that should be taken into account in making decisions regarding practices and conduct in the area of audiotext services. See 69 Fed. Reg. 61187.

¹Previously, four or five long distance carriers offered 900 transport service. Currently, only one carrier offers such service. In any event, the carrier prohibits Audioconference services via 900 numbers. Accordingly, if the Proposed Rules become law, Blue Audio and other Audioconference providers will be unable to offer their services.

D. LEGAL STANDARDS GOVERNING THE PROPOSED RULES

An administrative agency, such as the Commission, may promulgate regulations only consistent with the authority Congress delegates. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). An agency may not use its rulemaking authority to amend a statute or to insert something into the statute which is not already there, Iglesias v. United States, 848 F.2d 362, 366 (2d Cir. 1988), and any regulation inconsistent with the statutory mandate is invalid. Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981). For example, in Public Citizen v. FTC, the court ruled that absent evidence Congress intended to exempt utilitarian items from the smokeless tobacco law's labeling requirements, a Federal Trade Commission rule granting such an exemption exceeded the FTC's authority. Public Citizen v. FTC, 869 F.2d 1541, 1553-56 (D.C. Cir. 1989).

II. DISCUSSION

A. THE PROPOSED RULES EXCEED THE SCOPE OF THE COMMISSION'S AUTHORITY BECAUSE THEY EXPAND CONGRESS'S DEFINITION OF PAY-PER-CALL SERVICES

47 U.S.C. § 228 provides an express and unambiguous definition of "pay-per-call services". Blue Audio's services do not fall within the scope of that definition because (1) Blue Audio's consumers do not "pay . . . a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call," and (2) the services are not offered through one of the prefixes designated by the Commission. However, the NPRM proposes requiring Audioconference providers, such as Blue Audio: (1) to deploy services pursuant to pre-subscription agreements in writing or (2) receive payment by direct remittance from consumers (e.g., credit card). See 69 Fed. Reg. 61187-61188. The Proposed Rules prohibit Blue Audio from providing its services for free to consumers.

The Proposed Rules would expand the definition of pay-per-call services and the scope of Section 228. Consequently, the Proposed Rules violate the law that an "agency's interpretation of a statute cannot supersede the language chosen by Congress." New York v. United States Dep't of Transp., 700 F. Supp. 1294, 1300 (S.D.N.Y. 1988); Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("courts must give effect to Congress' unambiguously expressed intent, and cannot pay deference to a contrary agency interpretation"). In this instance, Section 228 unambiguously sets forth the definition of pay-per-call services and directs the Commission to promulgate rules that apply only to services within the scope of that definition. The Proposed Rules are contrary to the language Congress set forth in the statute, and therefore the Proposed Rules would be invalid.

Congress could have granted the Commission authority to modify the definition of pay-per-call services. Indeed, 15 U.S.C. § 5714 authorizes the Federal Trade Commission to extend the definition of pay-per-call-services (in certain circumstances) to “other similar services providing audio information or audio entertainment”. However, the FTC only has that authority in the event it determines “that such services are susceptible to the unfair and deceptive practices that are prohibited” under laws regulating false and deceptive advertising.² Notably, Congress did not grant the Federal Communications Commission this authority. If agencies such as the Commission had authority to promulgate the Proposed Rules, then 15 U.S.C. § 5714 would be superfluous. Accordingly, courts would likely not allow the Proposed Rules. See *Hohn v. United States*, 524 U.S. 236, 239 (1998) (noting that courts “are reluctant to adopt a construction making another statutory provision superfluous”).

B. THE PROPOSED RULES CONTRAVENE CONGRESSIONAL INTENT BEHIND TDDRA

In enacting TDDRA, Congress recognized that providers of pay-per-call services required consumers to pay “a charge *in addition to the regular long distance charges*” associated with the phone call for access to their services. See S. Rep. No. 102-190, at 1 (1991) (emphasis added). The majority of unfair and deceptive practices that prompted Congress to enact TDDRA related directly to the consumer’s inability to determine, and make informed decisions about, the charges for services. See, e.g., *Id.* at 2 (“When consumers call a 900 number, they are assessed a charge in addition to the regular long distance charges. Generally callers are either charged a flat fee per call or charged by the minute.”). For example, unscrupulous providers of pay-per-call services:

- (1) Failed to disclose in advertising for pay-per-call services that consumers must pay charges in addition to the regular long distance charges;
- (2) Used illegible print or inaudible audio messages in advertising for pay-per-call services to obscure the charges that consumers must pay in addition to the regular long distance charges; and
- (3) Used misleading advertisements for 800 numbers, which when called

²The FTC proposed regulations (in accordance with the statutory authority granted to it) which would have expanded the definition of pay-per-call to include any service “that provides . . . audio information or audio entertainment, including simultaneous voice conversation services, where the action of placing a call, receiving a call, or subsequent dialing, touch-tone entry, or comparable action of the caller results in a charge to a customer, and where all or a portion of such charge results in a payment, directly or indirectly, to the person who provides . . . such information or entertainment services.” Proposed 16 C.F.R. § 308.2 (g)(2) (63 Fed. Reg. 58524, Oct. 30, 1998 (the FTC did not ultimately adopt this regulation)). See *also* H.R.3490 (proposed legislation regulating audiotext industry in a manner similar to pay-per-call regime). Neither the proposed regulations nor the proposed legislation were enacted. Even under these definitions, Audioconference services would not be subject to increased regulation such as the proposed rule on the NPRM.

instruct the caller to call a 900 number, but did not disclose there would be a charge in addition to the regular long distance charges for the call to the 900 number.

Congress directed the TDDRA at these specific types of unfair and deceptive practices. See 15 U.S.C. § 5711 (FTC provisions).

The goals and intent of Congress in passing the TDDRA were clear. Services for which consumers paid additional charges (such as pay-per-call) were susceptible to certain types of fraud and deceit, and thus should be subject to special safeguards. Services for which consumers do not pay additional charges (such as Blue Audio's services) are not susceptible to the same types of fraud and deceit, and thus do not require special safeguards. Therefore, Congress's definition of "pay-per-call services" only includes services "for which the caller pays a per-call or per-time-interval charge that is greater than, or in addition to, the charge for transmission of the call." By contrast, services for which consumers are not required to pay any additional charge do not fall within that definition.

Blue Audio's landline customers pay only their regular local or long distance charges for transmission of the call. In many cases, such as when the consumer has an unlimited calling plan, the consumer pays nothing to access Blue Audio's services. Similarly, consumers can learn the full extent of the charges they would pay with respect to the services in advance, simply by checking on the local or long distance service provider's web site or by calling their regular local or long distance service provider. Finally, consumers can verify that they are accurately charged for services by viewing the per-minute rate and total minutes charged on their regular long distance bills. The concerns that prompted Congress to enact TDDRA are not present in the context of Blue Audio services. The Commission's intent to extend TDDRA protection to these types of services is unwarranted.

C. SECTION 228 DOES NOT PROHIBIT REVENUE SHARING ARRANGEMENTS

The NPRM additionally seeks comments about whether revenue sharing arrangements similar to those described in AT&T Corp. V. Jefferson Tel. Co., Memo Op. & Order, 16 FCC Rcd 16130 (2001) comply with Section 228. Jefferson held that revenue sharing arrangements between audiotext providers and local exchange carriers did not violate 47 U.S.C. § 201(b) (imposing the duty of common carriage). Jefferson did not rule on the applicability of Section 228. However, the case held the record did "not demonstrate that Jefferson failed to remain appropriately 'indifferent' as a common carrier, notwithstanding its access revenue-sharing arrangement with the audiotext provider." Jefferson, 16 FCC Rcd at 16137.

Jefferson stands for the proposition that a revenue-sharing arrangement does not affect

the ability of a local exchange carrier to act impartially. Similarly, there is no reason to believe revenue sharing arrangements would be otherwise inappropriate. In Blue Audio's case, none of the Terminating Carriers charge consumers any amount other than the standard transport fee. Accordingly, the Commission should not treat the calls to Blue Audio's services any different than a standard call. In the event the Commission believes carriers should be prohibited from charging additional fees to consumers for calls for which the carrier shares revenue, then the Commission should regulate that circumstance specifically. However, Blue Audio and similarly situated Audioconference providers should not be subject to additional regulation simply because the possibility exists that a rogue carrier might charge consumers a premium for services.

The Commission decided Jefferson against the backdrop of an earlier opinion letter which advised that certain revenue sharing arrangements violated both 47 U.S.C. § 201(b) and Section 228. See Letter from John Mileta, Chief of the Common Carrier Enforcement Bureau to Ronald Marlowe, 10 FCC Rcd 10945, DA 95-1905 (September 1, 1995) (the "Marlowe Letter"). Jefferson overruled the Marlowe Letter's conclusion. In so doing, it undermined the Marlowe Letter's central rationale, that "[t]hrough payments to an information provider or destination entity (other than standard settlement payments), a carrier would abandon objectivity and acquire a direct interest in promoting the delivery of calls to a particular number for the provision of a particular communication." (Marlowe Letter, p. 2.) The conclusions of the Marlowe Letter concerning Section 228 are of questionable validity at best. The facts of the Marlowe Letter make clear that the service described in that letter differs from Blue Audio's services. There, the "information provider" incurred expenses in creating the content, and passed those expenses on to the consumer. The letter notes that "the consumer ha[d], in fact, paid . . . albeit indirectly, for the information." (Marlowe Letter, p.3.) In the case of Blue Audio's revenue-sharing arrangements, there is no information creation expense to the Audioconference provider, and similarly, no correlating compensation from the consumer. Therefore, Blue Audio's services and revenue-sharing arrangements do not violate Section 228.

D. THE PROPOSED RULES RAISE FIRST AMENDMENT CONCERNS

The First Amendment provides protection from "overbroad laws that chill speech within the First Amendment's vast and privileged sphere." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002). Under the overbreadth doctrine, a statute or rule violates the First Amendment if it affects "a substantial amount of protected expression." Psinet, Inc. v. Chapman, 362 F.3d 227, 234 (4th Cir. 2004). Audioconference consumers, like participants in chat rooms, or those who use the postal service, enjoy First Amendment protection with respect to their speech. Cf. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 80 (1983) (Rehnquist, J., concurring in the judgment) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights."); Psinet, 362 F.3d at 234 (chat room participants entitled to First Amendment protection); Lamont v. Postmaster General, 381 U.S. 301, 304 (1965) (holding unconstitutional under the First Amendment a law that

burdened the individual's receipt of mail).³

The Proposed Rules impose an incidental burden on speech, both by placing restrictions on companies that offer services facilitating the speech, and by making it more difficult for consumers to engage in the speech. The additional restrictions, if enacted, will ultimately result in the loss of an avenue of expression for consumers. Accordingly, the Proposed Rules must pass intermediate level of scrutiny. Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994) (discussing intermediate scrutiny in the First Amendment context). Under this test, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Turner, 512 U.S. at 668. To satisfy this standard, a regulation must be narrowly tailored to promote the government interest. Narrow tailoring in this context requires, in other words, that the means chosen to regulate do not "burden substantially more speech than is necessary to further the government's legitimate interests." Id.

The Proposed Rules run afoul of this test in two regards. First, the Commission has not articulated an important government interest sought to be achieved in regulating Audioconference services. There is no evidence in the record that Audioconference services are prone to abuse or adversely affect consumers. The Commission merely speculates, based on the decrease in 900 number use, that pay-per-call service providers continue to ply their wares outside the 900 number arena while disguising their services. The record is also devoid of any consumer complaints with respect to Audioconference services. In all of its years in business, Blue Audio has not received one single consumer complaint.

Second, the Commission's approach fails the second prong of the Turner test because it affects more speech than necessary. The proposed additional billing requirements are not directed only to services which are prone to overreaching and abuse. Rather, Blue Audio customers who pay very little or nothing for services would be forced to jump through another hoop in order to access the services and express themselves.⁴ While some

³Blue Audio's customers do not engage in obscene or adult-oriented speech because that type of discourse is not permitted on Blue Audio lines. Even if it were, however, the speakers would enjoy First Amendment protection. See Psinet, 362 F.3d at 234 (noting that "[t]he blanket prohibition of adult commercial [chat-room] speech that the statute imposes violates the First Amendment"); Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 131 (1989) (striking down statute which banned adult access to telephone messages which are indecent but not obscene).

⁴Indeed, many Blue Audio customers would not be able to afford the services the Proposed Rules require, and many of these consumers, particularly those at lower income levels, do not even have credit cards or check-by-phone ability. Thus, the Proposed Rules would effectively discriminate against potential Blue Audio consumers from lower income levels.

audiotext services, in contrast to Blue Audio's Audioconference services, may be prone to overreaching, the Proposed Rules do not distinguish between the two. Thus, the Proposed Rules bring more speech than necessary within their reach.⁵ The Proposed Rules would therefore violate the First Amendment.

III. EFFECT OF THE PROPOSED RULES ON AUDIOCONFERENCE PROVIDERS

The Proposed Rules if enacted would create significant barriers to Blue Audio's business. Blue Audio cannot offer services to its landline customers by pre-subscription agreements or via direct remittance. Blue Audio does not currently bill its landline customers. It would take an undue amount of resources to set up the billing infrastructure the Proposed Rules require. Blue Audio and similarly situated small businesses cannot absorb the cost associated with the billing infrastructure. Many of the local exchange providers with which Blue Audio has contracts would be unwilling to renew agreements with Blue Audio due to the onerous billing requirements created by the Proposed Rules. In sum, the billing requirements envisioned by the Proposed Rules would eviscerate Blue Audio and other similarly situated small businesses. If promulgated, the Proposed Rules would lead to Blue Audio losing its business, resulting in the loss of jobs, tax revenues, and as set forth below, consumer choice.

IV. EFFECT OF THE PROPOSED RULES ON CONSUMERS AND CHOICE

The Proposed Rules would adversely affect consumer choice and would significantly undermine the consumer interest. Blue Audio currently provides consumers with an inexpensive and safe form of entertainment. Consumers nationwide utilize up to two million (2,000,000) minutes of Blue Audio services per day. Blue Audio provides its Audioconference services to between twenty thousand (20,000) and thirty thousand (30,000) unique consumers every day. Use of profanity and vulgar language is not permitted on Blue Audio bridged lines. Blue Audio screens out any customer messages containing any profane or vulgar language or which otherwise violate Blue Audio's terms of use. Consumers may on average pay between zero and three cents per minute to engage in conversation with other similar minded individuals. This amounts to at most \$1.80 per hour, which is far less than the cost of a movie or a McDonald's meal. When the consumer accesses a Blue Audio line located in the consumer's home city, the consumer does not pay any fees whatsoever.

The Proposed Rules, if enacted, would render Blue Audio's services impracticable. The consumer's interest will be adversely affected by this, and in enacting the Proposed Rules,

⁵A better solution to the "problem," to the extent one exists, is to regulate only those services that raise consumer protection concerns. For example, the Commission could impose regulations only on audiotext providers or long distance companies that charge consumers 10% or greater than standard transport fees.

the Commission would be acting contrary to its overriding purpose. See Trans Nat'l Communs. Inc. v. Overlooked Opinions, Inc., 877 F. Supp. 35, 43 (D. Mass. 1994) (noting that FCC's "purpose is to advance the consumer's interest").

V. CONCLUSION

The Proposed Rules go beyond the scope of TDDRA in imposing onerous billing requirements normally reserved for certain types of statutorily defined pay-per-call services. The Proposed Rules also contravene Congressional intent, which was principally concerned with regulating services where consumers pay amounts in addition to local or long distance charges, and abusive practices in connection therewith. The Blue Audio services are offered to consumers at the same local or long distance rate normally paid by consumers for calls to friends, family, and business associates. These services do not fit the definition of pay-per-call services and do not present the concerns Congress feared in passing TDDRA. The Proposed Rules would adversely affect Blue Audio's business, and Blue Audio would be forced to shut its doors and cease offering the services. Finally, and most importantly, the Proposed Rules would result in a loss of consumer choice and options. The effect of the Proposed Rules would be to eliminate a source of inexpensive and safe entertainment that thousands of people enjoy.

Therefore, Blue Audio respectfully requests that the Commission not enact the Proposed Rules, or limit the Proposed Rules consistent with 47 U.S.C. § 228 and the comments herein.

This letter does not represent a full statement of the facts or law relating to the services provided by Blue Audio, or application of the Proposed Rules to those services.

Blue Audio would be pleased to answer specific questions the Commission may have regarding the services. Should you have any questions, please do not hesitate to contact the undersigned directly at (206) 274-2800 or by email at derek@newmanlaw.com.

Very Truly Yours,

NEWMAN & NEWMAN,
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cc: Blue Audio Inc.